No. 97-1118

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

Introduction

The district court and the court of appeals both applied the well-established rule that the Eleventh Amendment ("Eleventh Amendment") prohibits private suits against states in federal court. In the circumstances here, both courts ruled that because Petitioner pointed to no evidence of consent or abrogation of Eleventh Amendment immunity, Petitioner's suit against all defendant state agencies and officials is barred. In addition, both courts agreed that even if Petitioner had established consent or abrogation of this immunity, Petitioner failed to raise any issues of material fact that would support his claim that the defendants conspired to deprive him of due process in violation of his civil rights.

The certiorari petition argues that the decisions below are in conflict with prior court decisions in deciding that Respondents were entitled to Eleventh Amendment immunity. The petition also argues that the decisions below depart from the accepted or usual course of judicial proceedings in failing to conclude that Petitioner was denied due process. Finally, Petitioner argues the decisions below erroneously concluded that Petitioner was not entitled to a jury trial because he presented no admissible evidence to support his claims that he was denied due process. As we now show, none of these arguments is a sufficient basis to grant the petition. The decision below simply follows well settled law, correctly applies that law to uncontested facts, and does so without working any intrusion upon Petitioner's constitutional rights.

A. The Decision Below Correctly Applies Well-Established Eleventh Amendment Law.

The Eleventh Amendment is a well-established limitation upon actions against states. It provides:

> The judicial power . . . shall not . . . extend to any suit in law or equity . . . against one of the United States by Citizens of another state or by citizens or subjects of any Foreign State.

U.S. Const., Amend. XI

This amendment has been interpreted to mean that an unconsenting state is immune from private suits brought in federal court by its own citizens or citizens of another state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Papasan v. Allain*, 478 U.S. 265, 276 (1986). The basis for this jurisdictional limit on Article III judicial power is that

> each state is a sovereign entity in the federal system . . . and . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 1122 (1996). Therefore, in order to avoid Eleventh Amendment immunity, a Petitioner must show express waiver of sovereign immunity by the state by consent in unequivocal terms, or clear abrogation of the state's Eleventh Amendment immunity by Congress. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-240 (1985).

Eleventh Amendment immunity can be waived by a state only if the waiver is "express and unequivocal." *Pennhurst*,

465 U.S. at 99. This requires that the waiver is stated in the most express language or by such overwhelming implication from the text [of state legislation] that there is no room for any other reasonable construction. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990); *Micomonaco v. State of Washington*, 45 F.3d 316, 319 (9th Cir. 1995). *See Mueller v. Thompson*, __ F.3d __, 1998 WL 17903 at *3 (7th Cir. 1998), remanded by the Court for reconsideration in light of *Seminole* in *Wisconsin v. Mueller*, __ U.S. __, 117 S. Ct. 1077 (1997). Petitioner fails to present in his petition any claim of consent by waiver of the Eleventh Amendment in his suit against the Department of Personnel Administration.

Congress has limited power to override the Eleventh Amendment pursuant to a constitutional provision specifically granting Congress such power. *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. at 1125 (1996). Congress' intent to override the Eleventh Amendment and permit suits against the states must be "unmistakably clear in the language of the statute itself." *Scanlon*, 473 U.S. at 242 (1985). Petitioner does not claim in his petition that Congress has abrogated the state's Eleventh Amendment immunity in this case. Therefore, this exception does not apply here.

Petitioner has noted that there is an exception to the Eleventh Amendment's general rule barring suits against state agencies under *Ex Parte Young* [209 U.S. 123 (1908)]. The *Young* exception allows suits against state agencies where state officials are sued in their individual capacities for prospective injunctive relief. *See id.* at 160. This exception does not allow suits for retroactive money damages against a state or state official. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-67 (1974) (holding *Young* inapplicable to claims for retroactive or damages relief against the state treasury and limiting the doctrine to actions for prospective relief). In the instant case, Petitioner seeks retroactive relief; namely, restoration to his former position. In addition, Petitioner has made no request for injunctive relief and in fact demands monetary

damages in the sum of $2 hundred million dollars each for general and punitive damages against Respondents. Therefore, the *Young* exception in no way applies to this case and Petitioner's suit is impermissible under the Eleventh Amendment.

B. The Decision Below Correctly Found That The Grievance-Arbitration Procedure To Which Plaintiff Was Entitled Satisfied Due Process Requirements.

The decision below properly concluded that the arbitration procedure set forth in Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 Memorandum of Understanding ("MOU") fully complied with the due process requirements of the United States Constitution.

Petitioner alleges that his civil rights were violated because the Respondents deprived him of due process by removing him from a specialty pay position. He argues that this action entitled him to a full administrative hearing pursuant to California Government Code § 3304. This position is based on the presumption that he had a property or liberty interest in maintaining his specialty pay position. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 537 (1985). The Public Safety Officers Bill of Rights Act, California Government Code § 3304(b), provides in pertinent part:

> No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

Pursuant to this statute, the California Supreme Court has held that

> a decision to reassign a peace officer to a lower paying position is per se disciplinary . . . and that the officer therefore must be afforded the "opportunity for administrative appeal."

White v. County of Sacramento, 31 Cal. 3d 676, 683-84 (1982). However, California Government Code § 3304 does not specify how the appeal process is to be implemented, and California courts have held that the procedural details are to be formulated by the local agency subject to minimal constitutional due process principles. *See Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1438, 1443 (1991); *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1806 (1993).

Thus, California law appears to create a property interest in maintaining a specialty pay position. Because Petitioner was reassigned to a lower-paying position, he was entitled to an administrative appeal, in accordance with due process. However, the decisions below properly concluded that the arbitration process to which Petitioner was entitled provided adequate due process; it included an opportunity to be heard, a full evidentiary hearing, and an impartial decision-maker. The Court has previously determined that although the state remedies may not provide a Petitioner with all the relief which may have been available if he could have proceeded under 42 U.S.C. § 1983, that does not mean that the state remedies are inadequate to satisfy the requirements of due process. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) [reversed on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986)].

Although the state arbitration process is final and binding, it is also subject to state court review as appropriate under the California Code of Civil Procedure [§ 1286.2(a) through (e)]. Several grounds are available for vacating an award, including if the award is procured by corruption of the arbitrator; if the rights of the party seeking vacation of the award were

substantially prejudiced by neutral arbitrator misconduct; if the arbitrator exceeded his or her power and the award cannot be corrected without affecting the decision's merits; and if the rights of the party seeking vacation were substantially prejudiced by the arbitrator's refusal to postpone a hearing upon sufficient showing of cause or the refusal to hear evidence material to the controversy. *See id.* Therefore, the arbitration process satisfies due process and is subject to court review for failure to adhere to such requirements.

As noted by the decisions below, Petitioner failed to avail himself of the arbitration procedure set forth in the MOU, and later tried to argue that the procedure would not have provided him with a meaningful opportunity to be heard. Plaintiff was given the opportunity to appear, with private counsel, before a neutral arbitrator and present evidence on his behalf. He failed to do so, justifying his failure by arguing that the Respondents took too long to select an arbitrator. However, delay alone is insufficient to establish a denial of due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-547 (1985) (holding that a two-and-a-half month delay between the time an employee filed his appeal and the time he received a hearing was not an unconstitutional delay, even if the statute provided for a hearing within 30 days of the appeal).

Given these facts, the decisions below properly concluded that, as a matter of law, the arbitration procedure set forth in the MOU fully complied with the due process requirements of the United States Constitution. Therefore, Petitioner fails to present in this petition a due process argument that justifies review.

C. There Was No Abuse Of Discretion By The Courts Below That Justifies Granting The Petition In The Instant Case.

Petitioner argues that the courts below abused their discretion by granting summary judgment when genuine issues

of material fact remained, and in denying Petitioner's motion to file a second amended complaint. However, Petitioner was afforded adequate due process through the arbitration procedure as a matter of law, and provided no specific acts by any of the Respondents to support his allegations. In addition, Petitioner failed to show good cause why he should be allowed to file a second amended complaint to substitute named parties for previously named individual Does.

Petitioner presented no admissible evidence to support his claims that Respondents: (1) failed to apply with the MOU; (2) improperly investigated Petitioner; or (3) made false allegations and relied on inadmissible evidence to support Petitioner's removal from his specialty pay position. Petitioner argues that his evidence can be found in the complaint and in depositions which were never lodged with the courts below. This "evidence" fails to comply with Federal Rule of Civil Procedure 56(e). Therefore, the courts below properly granted summary judgment for Respondents because Petitioner failed to provide the requisite evidentiary support.

Petitioner sought to file a second amended complaint to substitute named parties and allegations for previously named individual Does. However, all of the due process allegations against the newly-named respondents were previously raised by Petitioner in some form and had been disposed of by the court in the prior summary judgment proceeding. Therefore, Petitioner failed to show good cause for the delay or why the amendment would not be futile as required by Federal Rule of Civil Procedure 15(a) and *Foman v. Davis* [371 U.S. 178 (1962), holding that as a prerequisite to granting leave to amend it must be shown that the underlying facts or circumstances relied upon by plaintiff might be a proper subject of relief (371 U.S. at 182)].

CONCLUSION

Petitioner has failed to present any claim of consent, abrogation, or evidence of an exception to the states' Eleventh Amendment immunity to suits in federal court. Petitioner has failed to present any evidence that the arbitration procedure to which he was entitled denied him due process. Petitioner has failed to show any abuse of discretion by the courts below. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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